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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

EUGENE SILVA,

Defendant and Appellant.

B189446

(Los Angeles County  
Super. Ct. No. PA 046260)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Charles L. Peven, Judge. Vacated in part with directions and affirmed in part.

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Robert Derham, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Roy C. Preminger, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Eugene Silva of possessing a firearm as a felon (count 1), criminal threats (count 3), and assault with a firearm (count 5), and found that he personally used a firearm while committing the latter two crimes. (Pen. Code, §§ 12021, subd. (a)(1); 422; 245, subd. (a)(2); 12022.5, subd. (a); all further section references are to the Penal Code.)<sup>1</sup> In a bifurcated trial after a jury waiver, the court found that Silva had been convicted of seven “prison term” prior felonies, three of which were both “serious” and “strike” prior felonies. (§§ 667.5, subd. (b); 667, subds. (a)-(i), 1170.12.)

The court sentenced Silva to 25 years-to-life under the three strikes law for possessing a firearm as a felon (count 1) and a consecutive 44 years-to-life for assault with a firearm (count 5). The latter term consisted of 25 years-to-life under the three strikes law and consecutive terms of 4 years (the middle term) for personally using a firearm and 5 years for each of the three prior serious felony convictions. The court imposed but stayed the sentence for criminal threats (count 3) pursuant to section 654.

Silva appeals, contending that (I) insufficient evidence supports his conviction for criminal threats (count 3); (II) section 654’s prohibition on multiple punishment prohibits consecutive sentences for possessing a firearm as a felon (count 1) and assault with a firearm (count 5); and (III) the court abused its discretion in imposing consecutive terms for possession and use of and assault with a firearm.

We reject contentions I and II but agree with contention III, vacate the sentence, and remand for resentencing. In all other respects we affirm the judgment.

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<sup>1</sup> Silva also was tried for a criminal threat (count 2) against the brother of the victim in counts 3 and 5 and possessing methamphetamine (count 4). The court granted Silva’s motion to dismiss the latter charge at the close of the prosecution’s case (§ 1118.1) and the jury acquitted him of the former charge.

## FACTS

### A. The Crimes.<sup>2</sup>

Silva and Nancy Garcia, the victim, lived together with their three sons Eric (25 years old at the time of trial), Brian (21 years old), and Randy (12 years old). The family rented a house from Nancy's brother Reuben Garcia, who lived across the street. (To avoid confusion, we refer to the sons and Nancy by their first names.)

On about January 8, 2004, Nancy told Silva to move out of their house because he was not helping her financially, he was using drugs again, and he would stay away for days at a time. She also told Silva that Garcia wanted Silva to leave the house. Garcia was concerned because Silva brought "shady looking characters" to the house and damaged it, including breaking a window and "ble[e]d[ing] all over." Silva was "upset" and "mad" when Nancy told him to leave, but he complied.

About five days later, between 10:00 and 11:00 p.m. on January 13, Silva returned to the house. He walked into the living room through the unlocked front door, overturned the coffee table, threw and broke the telephone, and repeatedly demanded that Nancy and their three sons find his "fucking flashlight." He walked to the garage and threatened to break Brian's disc jockey equipment unless the family found his flashlight. Silva repeatedly cursed at and threatened his sons.

Silva then said to Nancy, "You come with me to the front porch. You are going to sit out here with me and your fucking kids are going to find my flashlight." Nancy complied, and she and Silva sat in chairs on the porch. Silva said, "We are going to . . . wait for your fucking fat ass brother to go by and see who pulls the trigger first." Silva then said, "Let me show you something." He walked to his car, which was parked in the driveway, returned to the porch, resumed his seat, pointed a handgun at Nancy's leg, and said, "How does it feel to have a gun pointed at you?" When Nancy replied, "Please don't do that. . . . You don't have to do that[.]" Silva told her, "I should take

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We omit evidence regarding the drug possession charge of which the jury acquitted Silva.

you for a ride.” In response, Nancy “got scared. I thought he . . . wanted to take me for a ride and do something to hurt me.” Silva next summoned Randy. When Randy came to the porch, Silva said to him, “I fucking hate you, you asshole. Find yourself a new dad.” Randy began crying and returned inside. Silva told Nancy, “I’ll be back. When I come back I want Randy . . . laying on the couch and I’m going to come back.” Silva then drove away.

Nancy told her sons that she had to call the police because she could not risk Silva returning and hurting anyone in the family.<sup>3</sup> Because Silva had broken the telephone, Nancy walked to a nearby police station, where she told an officer that Silva had pointed a gun at her, left, and said he was coming back. She also gave the police the license plate number of Silva’s car. Meanwhile, Garcia arrived at his home across the street from Nancy’s house. Eric approached and spoke with Garcia, who gave Eric a gun with which to defend himself and told him to go home, lock the doors, and if Silva returned, call the police.<sup>4</sup> Garcia then met Nancy at the police station and spoke with the police.

Garcia and Nancy returned to Nancy’s house and made arrangements for the two younger boys to sleep elsewhere. Garcia brought a shotgun and another handgun to Nancy’s house, retrieved the handgun he earlier had given to Eric, and slept on the living room floor while Nancy tried to sleep on the living room couch. Eric was in his bedroom. At about 2:30 a.m. on the morning of January 14, Silva returned. Nancy alerted Garcia, who called 911 using his cellular telephone. Silva went to the back door and said he would break in unless they opened it. Nancy told him to wait. Silva went to a bedroom window and said he would break the window unless they opened the door. Silva threatened to kill Garcia and broke the window. Garcia, who thought Silva was

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<sup>3</sup> Nancy testified that before January 13, 2004, Silva “had never hurt” her or their sons, nor had she previously seen him in possession of a gun.

<sup>4</sup> Eric, who refused to speak with prosecution investigators before trial, testified that Silva did not have a gun or threaten anyone, and that Eric did not tell Garcia the contrary. Eric denied being home when Silva returned to the house on January 14.

armed, fired one shotgun blast at Silva, wounding him. The police arrived moments later, arrested Silva, and found a loaded handgun outside the broken window. Nancy identified the gun as the one with which Silva had threatened her.

In defense, Brian and Randy testified that although Silva was angry on the evening of January 13, he did not have a gun and did not threaten anyone. Brian also testified that Silva had never hurt him or Nancy.

#### B. The Sentencing.

In denying Silva's motion to strike the "strike" prior convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the court recited that Silva had misdemeanor convictions in 1978 (reckless driving) and 1979 (driving with a suspended license), and felony convictions in 1979 (robbery), 1981 (burglary), 1985 (residential burglary), 1989 (possessing a firearm as a felon), 1990 (drug possession), 1991 (unlawful vehicle taking), and 1994 (robbery).<sup>5</sup> The 1979 and 1994 robberies and the 1985 residential burglary constituted "serious" felonies, and Silva served seven different prison terms for his felony convictions. The court then stated: "Mr. Silva is almost a model for somebody that the three-strikes law was written for . . . . [T]here are certain people that are just not fit to . . . live in society any longer, *and they should be locked up for the longest period of time that people can be locked up for, and they are violent individuals; and Mr. Silva . . . fits that criteria.*" (Italics added.)

The court then sentenced Silva to 25 years-to-life under the three strikes law for possessing a gun as a felon (count 1) and to a consecutive 44 years-to-life for assault with a firearm (count 5). The latter term included a 4-year middle term for personal firearm use and three 5-year enhancements for Silva's three prior serious felony convictions. The court imposed but stayed the sentence for the criminal threat (count 3) pursuant to section 654.

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<sup>5</sup> Silva's prison records disclosed that he was sentenced to 11 years in August 1994 and was paroled in June 2002. He committed these offenses in January 2004.

In explaining why it rejected Silva's argument that all the sentences should be concurrent because "[t]hey all flow from one act," the court stated: "[T]hese are independent allegations. [Silva] not only had to arm himself and come with a gun, *but then he had to fire the gun in the manner he did.* [¶] [Silva] also is . . . a serious danger to society." (Italics added.)

## DISCUSSION

### I. Sufficiency of the Evidence Supporting the Conviction for Criminal Threats.

Silva contends that insufficient evidence supports his conviction for criminally threatening Nancy (count 3). He argues that, under the circumstances, his statements to her, "How does it feel to have a gun pointed at you?" and "I should take you for a ride[,]"" are too vague" to constitute criminal threats because "although . . . ominous," there was no "specific threat," and his statements "were an angry, irrational outburst borne of the circumstances[,] particularly given "[t]he non-violent history between the parties." The contention lacks merit.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, internal quotations and citations omitted.) "When undertaking such review, our opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment. [Citation.]" (*People v. Hill*

(1998) 17 Cal.4th 800, 849.) This standard applies to review of criminal threat convictions pursuant to section 422 where, as here, the defendant does not claim that his words were constitutionally protected speech pursuant to the First Amendment. (*In re George T.* (2004) 33 Cal.4th 620, 630-634.)

As relevant, section 422 defines a criminal threat as occurring when anyone “willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family’s safety[.]”

We consider Silva’s words in the overall context in which they were uttered. A threat is not insufficiently vague “simply because it does not communicate a time or precise manner of execution,” or “standing alone, convey a threat to commit a crime which will result in death or great bodily injury. . . . [T]he meaning of the threat by defendant must be gleaned from the words and all of the surrounding circumstances.” (*People v. Butler* (2000) 85 Cal.App.4th 745, 752, 753 [statement that victim should “mind her own business or she was going to get hurt” sufficient where defendant grabbed victim’s arm showing his willingness to use physical force].) Moreover, courts also look at the defendant’s conduct after the threat to see if it was sufficiently precise to constitute a threat. (*Id.* at p. 755 [defendant’s later physical attack on the victim and her companions showed the threat was sufficiently precise]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1014.) On the other hand, “section 422 does not punish such things as ‘mere angry utterances or ranting soliloquies, however violent.’ [Citation.]” (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861 [student’s painting showing him shooting a school police officer who had cited him for drug possession, turned in as an art project, insufficient]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1135-1139 [student’s

statements to teacher after teacher accidentally hit student while opening door, “I’m going to get you and kick your ass,” insufficient where there was no history of animosity between them, student made no threatening gestures, and teacher sent student to the office in response, where student apologized].)

Applying these principles to our facts, we conclude that sufficient evidence supports Silva’s conviction for making a criminal threat. Despite the absence of prior violence or gun possession, Silva was angry because Nancy evicted him from their home. He returned several days later with a gun in his car, engaged in violent acts when he entered the house, overturning the coffee table, smashing the telephone, and verbally threatening and insulting the family, demonstrating both an intent and ability to use physical force. He threatened to shoot Garcia, then obtained the handgun, pointed it at Nancy, asked her how she liked having it pointed at her, and then said he should “take her for a ride,” which Nancy interpreted, consistent with its sinister colloquial meaning, that he would take her somewhere and hurt her. He then promised that he “would be back,” demonstrating an intent to return and carry out the threat. In response, Nancy reported the threat to the police and she and Garcia armed themselves, demonstrating their belief that the threat was real and immediate. A few hours later, Silva returned, armed with the loaded gun, and tried to break into the house. Contrary to his argument, the overall circumstances show the threat was real and imminent, as in *Butler* and *Solis*, and not a mere emotional outburst without intent to carry it out, as in *Ryan D.* and *Ricky T.* In context, Silva’s words were sufficiently precise to constitute a criminal threat.

## II. Consecutive Sentences for Possessing and Committing an Assault with a Firearm.

Silva contends that section 654 precludes consecutive sentences for possessing the firearm and assaulting Nancy with it. He argues that “the possession was incidental to the assault and therefore multiple punishment is barred.” We disagree.

“An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term



of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . .” (§ 654, subd. (a).)

“The standard for applying section 654 in the circumstances of this case was restated in *People v. Venegas* (1970) 10 Cal.App.3d 814[, 821] . . . . ‘Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms . . . constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.’” (*People v. Bradford* (1976) 17 Cal.3d 8, 22 [multiple punishment prohibited where defendant’s only gun possession occurred when he grabbed the officer’s gun during a struggle and assaulted the officer with it].) Where defendant only possesses the gun during or while in immediate flight from the substantive crime, he cannot be punished separately for both the gun possession and for using the gun in the underlying assault or robbery. (*People v. Venegas* (1970) 10 Cal.App.3d 814, 821.) Where, however, the defendant is found in possession of the gun after the underlying crimes are complete, multiple punishment is permitted. (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1413 [multiple punishment for violating section 12021 and committing two robberies proper where defendant uses the gun to commit two robberies at separate times and locations, and is found possessing the gun in a different location after the last robbery is complete].)

Here, Silva used the gun to assault and threaten Nancy between 10:00 and 11:00 p.m. on January 13. After committing those crimes, he drove off with the gun. When he returned and tried to break into the house while armed at about 2:30 a.m. the next morning, the earlier crimes had long since been completed, and Silva was not in flight therefrom. Under these circumstances, section 654 did not bar the court from imposing consecutive sentences for possessing the gun and assaulting Nancy with it.

### III. Imposition of Consecutive Sentences for Possession and Personal Use of and Assault with a Firearm.

Silva contends that the court abused its discretion in imposing consecutive sentences for assaulting Nancy with the firearm, personally using the firearm during that assault, and for possessing the firearm as a felon. He argues that because, in making its decision to impose consecutive sentences, the court erroneously assumed that he fired the gun, it abused its discretion. This contention has merit.<sup>6</sup>

A court abuses its sentencing discretion where it relies on incorrect facts to support the decision. (*People v. Read* (1990) 221 Cal.App.3d 685, 689-690.)

There was no evidence that Silva fired the gun; the only evidence of a firearm discharge was that Garcia shot Silva. The court's view of the seriousness of Silva's conduct and the appropriate length of his aggregate sentence may have been influenced by its incorrect belief that he discharged the firearm. This factual error also may have infected the court's decision whether to deny Silva's *Romero* motion in its entirety, rather than sentencing him as a second striker, or to sentence him as a third striker for one offense and strike the strikes as to the other crimes. (*People v. Garcia* (1999) 20 Cal.4th 490, 492-493, 496-504; *People v. Philpot* (2004) 122 Cal.App.4th 893, 905.) We cannot say that the court's comment that Silva deserved the maximum possible sentence likewise was not influenced by the same error. Had the court not so erred, it might have found that one three-strike sentence was enough to assure that Silva, 45 years old when he committed these crimes, would not be eligible for parole until he was an old man. Thus, we vacate the sentence and remand for resentencing.

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<sup>6</sup> We reject the Attorney General's argument that Silva waived this issue. Silva's counsel expressly argued for concurrent sentences; he was not required to repeat this argument after the court rejected it and imposed consecutive sentences.

## DISPOSITION

The sentence is vacated and the case is remanded for resentencing. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

VOGEL, Acting P.J.

JACKSON, J.\*

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\* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)